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AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
DEPT.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION, a  
Washington corporation,

Plaintiff,

v.

RYAN PITYLAK, an individual; MARK  
TROTTER, an individual; LEADPLEX,  
INC., a Nevada corporation; LEADPLEX,  
LLC, a Nevada corporation;  
PAYPERACTION, LLC, a Nevada limited  
liability company; and JOHN DOES 1-20,

Defendants.

CV05-0066

COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF



05-CV-00066-CMP

Plaintiff Microsoft Corporation ("Microsoft") brings this action against RYAN  
PITYLAK, MARK TROTTER, LEADPLEX, INC., LEADPLEX, LLC,  
PAYPERACTION, LLC, and JOHN DOES 1-20.

**I. JURISDICTION AND VENUE**

1. This is an action for trespass to chattels and conversion and for violations of  
the federal CAN-SPAM Act of 2003 (15 U.S.C. §7701 et seq.), the Washington Commercial  
Electronic Mail Act (RCW Ch. 19.190), the Washington Consumer Protection Act, and other  
state and federal causes of action. Microsoft seeks damages and injunctive relief to remedy

COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF - 1

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1 defendants' unauthorized use of Microsoft's computers and computer systems to send  
2 millions of misleading and deceptive unsolicited commercial e-mail messages, or "spam," in  
3 violation of Microsoft's policies and federal and law.

4 2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28  
5 U.S.C. § 1338(a). The Court has supplemental jurisdiction over the state law claims pursuant  
6 to 28 U.S.C. § 1367.

7 3. The Court has personal jurisdiction over the Defendants, who have engaged in  
8 business activities in and directed to Washington, have committed a tortious act within the  
9 state, have used personal property in the state, and have purposefully availed themselves of  
10 the opportunity to conduct commercial activities in this forum.

11 4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), because  
12 substantial part of the events or omissions giving rise to the claims pled herein occurred in the  
13 Western District of Washington.

14 **II. THE PARTIES**

15 5. Plaintiff Microsoft is a Washington corporation with its principal place of  
16 business in Redmond, Washington.

17 6. Defendant Ryan Pitylak is a Texas resident who resides in Austin, Texas.

18 7. Defendant Mark Trotter is a California resident who resides in Encinitas,  
19 California.

20 8. Defendant Leadplex, Inc. is a Nevada corporation with its principal place of  
21 business in Carson City, Nevada.

22 9. Defendant Leadplex, LLC is a Nevada corporation with its principal place of  
23 business in Carson City, Nevada.

24 10. Defendant Payperaction, LLC is a Nevada limited liability company with its  
25 principal place of business in Carson City, Nevada.

11. Microsoft is unaware of the true names and capacities of defendants sued herein as DOES 1 - 20, inclusive, and therefore sues these defendants by such fictitious names. Microsoft will amend this complaint to allege their true names and capacities when ascertained. The defendants are the owners, operators, and advertisers of the Internet domains bgtv89.biz and optioreard12.com, and other affiliated domains. Microsoft is informed and believes and therefore alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that Microsoft's injuries as herein alleged were proximately caused by such defendants. These fictitiously named defendants, along with the defendants named above, are herein referred to collectively as "defendants."

12. The actions alleged herein to have been undertaken by the defendants were undertaken by each defendant individually, were actions that each defendant caused to occur, were actions that each defendant authorized, controlled, directed, or had the ability to authorize, control or direct, and/or were actions each defendant assisted, participated in, or otherwise encouraged, and are actions for which each defendant is liable. Each defendant aided and abetted the actions of the defendants set forth below, in that each defendant had knowledge of those actions, provided assistance and benefited from those actions, in whole or in part. Each of the defendants was the agent of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and with the permission and consent of other defendants. Each of the defendants knew, or consciously avoided knowing, that other defendants had or would engage in a pattern or practice that violated the CAN-SPAM Act of 2003.

### III. NATURE OF MICROSOFT'S INTERNET E-MAIL SERVICES

13. Microsoft owns and operates interactive computer services that enable its customers to, among other things, access the Internet and exchange electronic mail ("e-mail") on the Internet. Microsoft owns and maintains computers and other equipment, including specialized computers or "servers" that process e-mail messages and otherwise support its e-

1 mail services. Microsoft maintains this equipment in Washington and California, among  
2 other states. E-mail sent to and from Microsoft's customers is processed through and stored  
3 on these computers. Microsoft is an internet service provider ("ISP"), an "interactive  
4 computer service" as defined by RCW § 19.190.010, and a provider of "Internet Access  
5 Service" as defined by 15 U.S.C. §7702(11).

6 14. One of Microsoft's services is "MSN Hotmail" which provides free and  
7 subscription based email on the Internet through a web-based e-mail service that can be  
8 accessed at [www.hotmail.com](http://www.hotmail.com). MSN Hotmail allows account-holders to exchange e-mail  
9 messages with any other e-mail user who has an Internet e-mail address throughout the world.  
10 MSN Hotmail has millions of registered accounts, whose users all have unique e-mail  
11 addresses ending in "@hotmail.com."

12 15. Another of Microsoft's services is "MSN Internet Access" (referred to herein  
13 as "MSN") which provides free and subscription-based e-mail services that can be accessed  
14 on the web or via Microsoft's proprietary network. MSN allows account-holders to exchange  
15 e-mail messages with any other e-mail user who has an Internet e-mail address throughout the  
16 world. MSN has millions of registered accounts, whose users all have unique e-mail  
17 addresses ending in "@msn.com."

#### 18 **IV. SPAM AND THE PURPOSES BEHIND THE FEDERAL CAN-SPAM ACT**

19 16. Unsolicited commercial e-mail is often referred to as "spam." The  
20 transmission of spam, a practice referred to as "spamming," by persons known as  
21 "spammers," is widely condemned in the Internet community, and is of significant concern  
22 and economic detriment to Microsoft and its customers.

23 17. In passing the Commercial Electronic Mail Act, RCW Ch. 19.190, in 1998,  
24 Washington became one of the first states to regulate spam. The legislature has recognized  
25 that the spamming practices prohibited by the Act are "matters vitally affecting the public  
26

1 interests" and are unfair and deceptive practices which impact Washington businesses and  
2 consumers.

3 18. The United States Congress, in passing the CAN-SPAM<sup>1</sup> Act of 2003,  
4 concluded that "[u]nsolicited commercial e-mail, commonly known as 'spam', has quickly  
5 become one of the most pervasive intrusions in the lives of Americans." Congress estimated  
6 that by the end of 2003, if not sooner, spam would account for over 50% of all e-mail. This is  
7 in sharp contrast to two years earlier when spam only accounted for 8% of all e-mail.  
8 Congress has concluded that the rate at which spam is increasing is "reaching critically high  
9 levels." In fact, in 2003, an estimated 2 trillion spam messages were expected to be sent over  
10 the Internet.

11 19. The economic impact of spam is enormous. Congress noted that a 2001  
12 European Union study found that "spam costs Internet subscribers worldwide \$9.4 billion  
13 each year." Congress also noted that the estimated costs "to United States businesses from  
14 spam in lost productivity, network system upgrades, unrecoverable data, and increased  
15 personnel costs, combined, will top \$10 billion in 2003." Of that amount, approximately \$4  
16 billion will be associated with lost employee productivity.

17 20. In addition to plaguing recipients and ISPs by its sheer volume, spam is also  
18 notoriously deceptive in form and content. In April 2003, the Federal Trade Commission  
19 found that 66% of all spam contains "some kind of false, fraudulent, or misleading  
20 information, either in the e-mail's routing information, its subject line, or the body of its  
21 message." In fact, the FTC found that "one-third of all spam contains a fraudulent return e-  
22 mail address that is included in the routing information (known as the 'header') of the e-mail  
23 message." Congress found that falsified headers "not only trick ISP's increasingly  
24  
25

26 <sup>1</sup> CAN-SPAM is an acronym for "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003".

1 sophisticated filters,” but also “lure consumers into mistakenly opening messages from what  
2 appears to be people they know.”

3 21. Congress also found that not only do spammers use false sender information,  
4 but they also use false or misleading subject lines. According to Congress, the FTC found  
5 that 42% of spam contains misleading subject lines that “trick the recipient into thinking that  
6 the e-mail sender has a personal or business relationship with the recipient.” Congress  
7 provided examples of this type of false or misleading subject line: “Hi, it’s me” and “Your  
8 order has been filled.”

9 22. As Congress recognized, the growth in unsolicited commercial electronic mail  
10 imposes significant monetary costs on providers of Internet access services that carry and  
11 receive such mail, as there is a finite volume of mail that such providers can handle without  
12 further investment in infrastructure. The sheer volume of spam is threatening to overwhelm  
13 not only the average consumer’s in-box, but also the network systems of Internet access  
14 service providers.

15 23. Microsoft’s computers and computer systems are designed and created solely  
16 for the benefit and the non-commercial personal use of its customers. The computers and  
17 computer systems have finite capacity and are not designed to accommodate innumerable  
18 mass mailings from spammers. Microsoft has been required to expend substantial amounts  
19 for new equipment to handle the mass mailings by spammers.

20 24. Although it costs very little for a spammer to transmit innumerable e-mail  
21 messages, handling the enormous volume of e-mail initiated by spammers places a  
22 tremendous burden on Microsoft. Spam demands storage space and processing capacity of  
23 Microsoft’s computers and computer systems, making those resources unavailable to serve  
24 the legitimate needs of Microsoft’s customers. The diversion of these resources from  
25 processing authorized e-mail impairs the normal operation of the computers and computer  
26 systems. Therefore, the value of that equipment is diminished by spamming.

1           25. In an attempt to protect itself and its customers from spam, Microsoft has  
2 expended significant resources to developing technologies and practices to prevent its  
3 subscribers from sending or receiving spam. Spammers, however, continue to adopt practices  
4 and technological devices to evade Microsoft's technologies and to frustrate Microsoft's  
5 efforts.

6           26. Microsoft has invested substantial time and money in efforts to disassociate  
7 itself from spam and the spammers who promote and profit from spam, as well as in seeking  
8 to protect its registered users worldwide from receiving spam.

9           27. Microsoft has a clearly articulated policy prohibiting the use of its services for  
10 junk email, spamming, or any unsolicited messages (commercial or otherwise). Microsoft's  
11 policies also prohibit automated queries of any sort, harvesting or collection of e-mail  
12 addresses, and any use of the services that is not personal and non-commercial. These  
13 policies are included in the Terms of Use for MSN and MSN Hotmail, which can be accessed  
14 via a clearly marked link on [www.msn.com](http://www.msn.com), as well as on the home pages for each of the  
15 services.

#### 16                   **V. DEFENDANTS' UNLAWFUL CONDUCT**

17           28. Microsoft is informed and believes, and on that basis alleges, that defendants  
18 have been—and are currently involved in—widespread spamming by sending misleading,  
19 deceptive and unsolicited commercial e-mail to MSN Hotmail account holders.

20           29. Microsoft is informed and believes, and on that basis alleges, that defendants  
21 own or operate a number of Internet domains, by which they advertise their products or  
22 services including, but not limited to, the domains [bgiv89.biz](http://bgiv89.biz) and [optinrcard12.com](http://optinrcard12.com).

23           30. Microsoft is informed and believes, and on the basis alleges, that its MSN  
24 Hotmail service has received millions of unsolicited commercial e-mail messages from  
25 defendants advertising their domains, and offering products or services relating to mortgages,  
26 on-line debt reduction and on-line dating services.



31. Many of those e-mail messages contain false and misleading subject lines, for example "Dj: 123 Fake St. Blvd 29174 Deliverence Al Loan Statement" and "Rieck Residence: Rr 2 Box 409 Mortgagor Statement."

32. Microsoft has been adversely affected by defendants' actions. As a result of defendants' activities, Microsoft's computer equipment and servers were required to process millions of improper spam e-mails, as well as "bounce back" e-mails which had been sent by defendants to non-existent, out-dated or incorrect e-mail addresses. This significant number of e-mails has taken up substantial amount of Microsoft's finite computer space, threatens to delay and otherwise adversely affect MSN Hotmail subscribers in sending and receiving legitimate e-mail, and has resulted in and continues to result in significant costs to Microsoft.

**COUNT I**  
**(Violation of the Federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003—"CAN-SPAM" (15 U.S.C. § 7704(a)(2, 3 and 5)))**

33. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 32 above.

34. Defendants engaged in a pattern or practice of initiating, to protected computers, commercial e-mail messages that:

a) contained subject headings that defendants knew, or reasonably should have known, were likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the messages;

b) failed to contain a functioning return e-mail address or other Internet-based mechanism, clearly and conspicuously displayed, that a recipient could use to submit a reply e-mail message or other form of Internet-based communication requesting not to receive future commercial e-mail messages from that sender at the e-mail address where the message was received; and



c) failed to include a clear and conspicuous identification that the message was an advertisement or solicitation, failed to provide a clear and conspicuous notice of the opportunity to decline to receive further commercial electronic mail messages from the sender; or failed to provide a valid physical postal address of the sender.

35. Defendants' actions were willful and knowing.

36. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

37. Defendants' actions violated 15 U.S.C. § 7704(a)(2), (a)(3) and (a)(5), and entitle Microsoft to injunctive relief, statutory damages and aggravated damages because of defendants' willful and knowing violation of the CAN-SPAM Act.

## COUNT II

(Violation of the Washington Commercial Electronic Mail Act (RCW Ch. 19.190) and the Washington Consumer Protection Act (RCW Ch. 19.86))

38. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 37 above.

39. Defendants initiated the transmission, conspired with one another to initiate the transmission or assisted in the transmission of commercial e-mail messages from a computer located in Washington and/or to an e-mail address that they knew, or had reason to know, is held by a Washington resident. Those commercial e-mail messages:

a) used another third party's internet domain names without permission;

b) misrepresented or obscured information identifying the true point of origin or the transmission path of a commercial electronic e-mail message; or

c) contained false or misleading information in the subject line.

40. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

41. Defendants' actions violated RCW § 19.190.020, and entitle Microsoft to actual damages or statutory damages of \$1,000 per email, whichever is greater.

1 42. Defendants' actions affected the public interest, are unfair or deceptive acts in  
2 trade or commerce and unfair methods of competition, and violated the Washington  
3 Consumer Protection Act, RCW Ch. 19.86. Microsoft is entitled to treble damages and an  
4 award of its attorneys' fees and costs under that Act.

5 **COUNT III**  
6 **(Trespass to Chattels)**

7 43. Microsoft realleges and incorporates by this reference each and every  
8 allegation set forth in paragraphs 1 through 42 above.

9 44. The computers, computer networks and computer services that constitute  
10 Microsoft's MSN Hotmail e-mail system are the personal property of Microsoft.

11 45. Defendants were aware that their actions were specifically prohibited by  
12 Microsoft's Terms of Service and/or were on notice that Microsoft did not authorize their  
13 actions in any way.

14 46. Defendants have knowingly, intentionally and without authorization used and  
15 intentionally trespassed upon Microsoft's property.

16 47. As a result of defendants' actions, Microsoft has been damaged in an amount  
17 to be proven at trial.

18 **COUNT IV**  
19 **(Conversion)**

20 48. Microsoft realleges and incorporates by this reference each and every  
21 allegation set forth in paragraphs 1 through 47 above.

22 49. Defendants have willfully interfered with and converted Microsoft's personal  
23 property, without lawful justification, as a result of which Microsoft has been deprived of  
24 possession and use of its property.

25 50. As a result of defendants' actions, Microsoft has been damaged in an amount  
26 to be proven at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Microsoft respectfully requests that the Court enter judgment against defendants, jointly and severally, as follows:

1. That the Court issue temporary and permanent injunctive relief against defendants, and that defendants, their officers, agents, representatives, servants, employees, attorneys, successors and assignees, and all others in active concert or participation with defendants, be enjoined and restrained from:

a) establishing any accounts with Microsoft's MSN or MSN Hotmail services;

b) using Microsoft's computers and computer systems in connection with sending commercial e-mail messages;

c) making unauthorized use of Microsoft's computers and computer systems;

d) continuing to violate Microsoft's Terms of Service;

e) continuing to violate the CAN-SPAM Act of 2003, or the Washington Commercial Electronic Mail Act; and

f) assisting, aiding, or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs a) through e) above.

2. That the Court award Microsoft actual damages, liquidated damages and statutory damages, in amount to be proven at trial;

3. That the Court award Microsoft its attorneys' fees and costs incurred herein; and

4. That the Court grant Microsoft such other or additional relief as is just and proper.

1  
2 DATED this 13<sup>th</sup> day of January, 2005.

3  
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